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No. 82-245

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANDREA CISNEROS JALIFI, Widow,
Appellant,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA, and
DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Appellees.

On Appeal From the Supreme Court of Arizona

Jurisdictional Statement

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QUESTIONS PRESENTED

1. What level of scrutiny should be afforded a state statute withdrawing a vested property right solely because of the non-resident alien status of its holder?
2. Whether a state statute intended to ease administration and preserve the fisc may constitutionally reduce by forty percent the workmen's compensation death benefits to non-resident alien dependents of a United States citizen.

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OPINIONS BELOW

The opinions of the Arizona Court of Appeals, on the merits and denying rehearing, and of the Arizona Supreme Court, denying review, have not yet been officially reported. A copy of each is set forth in the appendix hereto.

JURISDICTION

The decision of the Arizona Supreme Court, denying review and thus affirming and making final the appellate court's determination that appellant's workmen's compensation death benefits could constitutionally be reduced, pursuant to a state statute, where the dependent recipient thereof is neither a citizen nor a resident at the time of death, was entered on May 11, 1982. See appendix.

A NOTICE OF APPEAL to this Court was duly filed in the Supreme Court of Arizona on July 22, 1982. An AMENDED NOTICE OF APPEAL was filed in the Arizona Court of Appeals on July 27, 1982. This appeal is being docketed in this Court within 90 days from the denial of review below.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). *See Harrison v. Denckla*, 357 U.S. 235, 244 (1957); *LaCross Tel. Corp. v. Wisconsin Board*, 336 U.S. 18 (1948).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution, Section One:

> "... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

8 A.R.S. § 23-1046(c) at 595:

> "A death benefit paid to an alien not residing in the United States shall be only sixty percent of the amount specified in this section."

QUESTIONS PRESENTED

1. What level of scrutiny should be afforded a state statute withdrawing a vested property right solely because of the non-resident alien status of his holder?
2. Whether a state statute intended to ease administration and preserve the fisc may constitutionally reduce by forty percent the workmen's compensation death benefits to non-resident alien dependents of a United States citizen.

STATEMENT OF THE CASE

Miguel Jalifi was a United States citizen on May 11, 1978, when he died by industrial accident arising out of and in the course and scope of his employment. Mr. Jalifi was survived by his wife and their three minor children. On December 8, 1978, the Industrial Commission of Arizona entered its Findings and Award of full dependent's benefits based on an average monthly wage of approximately $650. That award was protested by the employer and by Findings and Award of August 13, 1979, the Industrial Commission re-determined Miguel Jalifi's average monthly wage at $450. Thereafter, on October 9, 1979, the Industrial Commission entered its Amended Findings and Award for Death Benefits.

That decision concluded that Mrs. Andrea Jalifi was a non-resident alien when her husband died and reduced that portion of the award attributable to her by forty percent pursuant to A.R.S. § 23-1046(c). Appellant's total award was thereby reduced from about $160 to $95 monthly. On December 7, 1979, the widow filed a request for hearing and on April 8, 1980, the Industrial Commission entered its award affirming the October 9, 1979 decision. Appellant then requested review and on May 9, 1980 the award of April 8, 1980 was affirmed.

A timely petition for special action followed, challenging the constitutionality of Arizona's benefit reduction scheme, *see* A.R.S. § 23-1046(c), on equal protection, supremacy, and due process grounds. The decision of the Arizona Court of Appeals was filed on March 11, 1982. It held that A.R.S. § 23-1046(c) did not in any way offend the United States Constitution. Appellant's timely motion for rehearing was denied on April 23, 1982, and on May 11, 1982 the Arizona Supreme Court denied appellant's timely petition for review. On July 22, 1982 appellant noticed the Court of this appeal, thereafter amending said notice on July 27, 1982. See appendix.

THE QUESTIONS ARE SUBSTANTIAL

Arizona's Workmen's Compensation Act contemplates reimbursement of a worker injured during and in the course of his employment for the earning capacity lost thereby. *Bugh v. Bugh*, 125 Ariz. 190, 608 P2d 329 (App. 1980) Under the act, the injured worker need not prove fault or forego compensation due to insolvency of the tortfeasor. A.R.S. § 23-907; *Yates v. Industrial Commission*, 116 Ariz. 125, 568 P2d 432 (App. 1977); A.R.S. § 23-981.

The worker, or, in the event of death, his dependents, however, may not pursue a tort claim for relief in addition to an entitlement under the Workmen's Compensation Act. A.R.S. § 23-901, *et. seq.* In the case of an insured employer, the worker must actually elect to forfeit the workmen's compensation benefits prior to his injury in order to obtain jurisdiction in a trial court after the injury. If the employer has no policy, the worker may elect after he has sustained an injury. In either case, however, the election is final. A.R.S. § 23-906; *Jackson v. Northland Const. Co.*, 111 Ariz. 391, 531 P2d 144 (1975); *Mariscal v. American Smelting & Refining Co.*, 111 Ariz. App. 148, 548 P2d 412 (1976).

As such, it is clear that appellant, and all those similarly situated, have a property interest in the benefits of the Workmen's Compensation Act, just as they would have had an interest in a judgment if they had pursued a tort cause of action. *See also Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interest in legitimate claim of entitlement to a benefit); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (Property interest where rules support claim of entitlement).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution affords its benefits

to any person entitled to bring an action in the discriminating state's courts. *Kentucky Finance Corporation v. Paramount Auto Exchange*, 262 U.S. 544, 550 (1923). Because the event giving rise to her claim occurred in Arizona, Mrs. Jalifi may challenge the non-resident alien classification that withdraws a portion of her otherwise vested claim for benefits. *See Mathew v. Diaz*, 426 U.S. 67 (1976); *Jonnson v. Eisentrager*, 339 U.S. 763 (1950); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Some confusion nevertheless exists in that non-resident aliens have occasionally been denied an opportunity to litigate their equal protection claims. *See, e.g., DeTenorio v. McGowan*, 510 F2d 92, 101, *reh. denied*, 513 F2d 294 (5th Cir.) *cert. denied*, 423 U.S. 877 (1975); *Carmen Pedrazza, et al, v. Sid Fleming Contractor, Inc.*, 94 NM 59, 607 P2d 597, 600 (1980). Presumably, however, the legitimate claim of entitlement in the instant case marks its distinction from *DeTenorio* and *Pedrazza*.

More importantly, in *Pedrazza, supra*, the New Mexico Supreme Court upheld the constitutionality of its law disallowing all workmen's compensation benefits to non-resident aliens, even while noting that "clearly, the plaintiffs are being subjected to hostile legislation. . ." Id. the lower court holding in the instant case similarly upholds the constitutional validity of a statute discriminating against non-resident aliens. See appendix.

In contrast, California seemingly would not permit the classification. *See generally Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916). Neither would Kansas. In *Vietti v. George K. Mackie Fuel Co.*, 109 Kansas 179, 197 Pac. 881 (1921), that state's Supreme Court held that the alien dependents of the deceased worker were entitled to full benefits under Kansas Workmen's Compen-

sation Act by virtue of a United States treaty with Italy. However, in discussing the Act's limitation on benefits for dependent aliens, the Court stated:

> It may be added that the statutory limitation is also in contravention of the fourteenth amendment of the federal constitution, which provides. . . [equal protection guarantees], 197 Pac. at 883.

Some conflict does therefore exist among the states on the precise issue presently before this Court, though *Pillsbury* and *Vietti, supra,* arguably turn upon differing facts and issues. As such, current authority seems to deny equal protection of worker's compensation law to non-resident aliens. The more well-reasoned view, however, would not find even a rational means for promoting a legitimate state interest in the classification:

> It may reasonably be thought that the best interests of the state, of the employers of labor, and those employed, as well as of the public generally, are promoted by imposing upon the industry or the public the burden of industrial accident and some such theory lies at the bottom of all workmen's compensation statutes (*Western Indemnity Co. v. Pillsbury, supra*)—the residence and the citizenship of the injured worker, or (if he shall have met death) of his dependents, are factors entirely foreign to the discussion. The legislature has determined that the employment of labor in given pursuits entails upon the employer certain responsibilities towards the persons performing the labor and those dependent upon them. There is no constitutional or rational ground for limiting the benefits of this legislative scheme to citizens or residents of this state. *Western Metal v. Pillsbury, supra,* 156 Pac. at 495.

The confusion evident in this field has in part been occasioned by uncertainty as to the proper standard of consti-

tutional review. The instant classification arguably cuts across both alienage and national origin and strict scrutiny should therefore be afforded. *E.g., Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976); *Sugarman v. Dougal,* 413 U.S. 63 (1972); *In re Griffiths,* 413 U.S. 717 (1973); *Graham v. Richardson,* 403 U.S. 365 (1971).

This Court, however, has not previously considered what scrutiny should be afforded to laws that discriminate against non-resident aliens, or to what extent that determination is affected by the right alleged to have been denied by the classification. Analogously, this Court has recently indicated that if the right denied by a classification relates to the operation of a government entity, the otherwise strict scrutiny may be relaxed. *See Ambach v. Norwick,* 441 U.S. 68 (1979); *Foley v. Connelie,* 435 U.S. 291 (1978); *Sugarman, supra. See Lehndorff Geneva, Inc. v. Warren,* 74 Wis.2d 369, 246 NW2d 815 (1976). The two jurisdictions which previously decided the non-resident alien scrutiny issue reach different results. *Compare Lehndorff Geneva, supra* (rational basis test for statute limiting land ownership by non-resident alien; no vested entitlement), *with Sailer v. Tonkin,* 356 F.Supp. 72 (Virgin Islands 1973) (Strict scrutiny for statute denying injury compensation to non-resident aliens; right accrued by statutory entitlement).

In the instant case, the lower court apparently followed *Lehndorff Geneva, supra,* notwithstanding the presence of a statutory entitlement. See appendix. *See also Doe v. Plyer,* 458 F.Supp. 569 (1978). Insofar as many states have enacted statutes tending to classify non-resident aliens, it is crucial to the jurisprudence of every jurisdiction that some test be established to guide selection of an appropriate standard of review.

A strict scrutiny analysis of classifications like that involved in the instant case would clearly affect the outcome of a constitutional challenge. A.R.S. § 23-1046(c) allegedly eases administration of the workmen's compensation act by rewarding insurance companies for the difficulties involved in spying on possibly fraudulent claimants in foreign countries. See appendix. Simpler, fairer, and more effective methods of preventing fraud, however, are easily conceived in the case of an injury resulting in death. Also, A.R.S. § 23-1046(c) purportedly preserves the fisc by denying entitlements to persons who probably would not become a public charge notwithstanding the denial, and by limiting the benefits where the person entitled is residing in an area having a lower cost of living. See appendix. Even if fiscal considerations are compelling, *but see Shapiro v. Thompson*, 394 U.S. 618 (1968), alternatives are available which are both more proper and effective and also less restrictive. Moreover, the cost of living assertion is particularly illusory and question begging. If a dead worker's dependents have been residing in Mexico, their standard of living will be a function of the cost of living there and the income of the wage earner. Any diminution of a death benefit, especially a forty percent diminution, is nothing more than an arbitrary reduction of the support previously relied upon by the decedent's dependents. A cost of living adjustment that was fairly applied would take effect only if the dependents moved to a new location after the death benefit was awarded.

Further, this Court should note that Mexicans working in the United States typically earn minimal wages. The maximum workmen's compensation award is typically two thirds of that wage. Another forty percent diminution is a devastating blow to the support of a decedent's dependents.

Aliens frequently come into the United States, contribute to its economy, pay taxes, and have wrongs perpetrated against them. Some aliens commute to jobs in the United States from their homes to the north and south of our border. Many United States citizens have alien families which they are unable to support in the United States, even though the families could lawfully reside here. Inevitably, some event occurring in the United States will touch the lives of a non-resident alien, and give rise to a lawful claim.

The resolution of these claims is a matter of significant importance not only to the aliens particularly affected, but also to the economic well-being of the United States in general. *See Saxbe v. Bustus,* 419 U.S. 65 (1974); *Gonzales v. Workmen's Compensation Appeals Board,* 49 Cal. App. 3rd 280, 122 Cal. Rptr. 515 (1975). It is apparent that there can be no uniformity in the several jurisdictions, and no reasoned application of the law, until this Court considers the parameters of equal protection guarantees for persons classified as non-resident aliens.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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